IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1021 OF 2000

1) Mr.Damodar Narcinva Naik,
2) Mr.Narcinva Damodar Naik
3) Mr.Pradeep Vassudev Naik
through Power of attorney
4) Mr.Vivek Vassudev Naik
through Power of Attorney
Residents of E-54, Abade
Faria Road, Margao
Goa - 403 601. ..Petitioners.

All Ex-partners of M/s.Zuari
Stainless Steel Industries,
V.N. Naik Road, Arlem,
Margao - 403 601.

V/s.

1) Union of India & Ors.
(Through standing Counsel with
its office at 1st Floor,
Trionara Apartments, Panaji
2) Commissioner of Customs &
Central Excise, Dayanand
Bandodkar Marg, Panaji,
Goa - 403 001.
3) Asstt.Commissioner of Customs(A)
Customs House, Marmagao, Goa.
4) Commissioner of Customs (Appeals)
Annexe Bldg., 7th Floor, New
Customs House, Ballard Estate,
Mumbai - 400 038. ..Respondents.

Mr.D.B.Shroff, senior advocate i/b. Mulla & Mulla for the petitioners.

Mr.P.S.Jetly, advocate with Y.R.Mishra for respondents.

CORAM : V.C.DAGA AND J.P.DEVADHAR, JJ.

DATED : 15TH SEPTEMBER, 2005.

JUDGMENT (PER J.P.DEVADHAR, J.)

1. Validity of the clarification issued by the Finance Ministry on 28/10/1998 under the Kar Vivad Samadhan Scheme ('KVSS' for short) as well as the orders dated 26/2/1999 and 24/3/1999 passed by the Customs Authorities declining to grant the benefit of KVSS in respect of the warehoused raw materials by relying upon the aforesaid clarification dated 28/10/1998 are challenged in this petition.

2. The petitioners are all ex-partners of M/s.Zuari Stainless Steel Industries, a 100% export oriented unit (EOU). The firm was engaged in the manufacture and export of stainless steel utensils. For manufacture of stainless steel utensils the petitioners were entitled to import raw materials such as steel sheets in coils. The imported raw materials were cleared to the bonded warehouse without payment of duty for the manufacture of the final product, namely, stainless steel utensils and the said final product were to be exported directly from the warehouse. The quantity of imported raw materials utilised in the manufacture of final product

and exported from the warehouse is exempt from payment of customs duty. The unutilised raw materials were to be cleared from the warehouse within the bond period on payment of duty prevailing on the date of exbonding. If the unutilised raw materials stored in the warehouse were not cleared within the bond period, then it was open to the customs authorities to treat the unutilised raw materials as deemed to be cleared from the warehouse and demand customs duty with interest under Sections 72 & 61 of the Customs Act.

3. In the present case, it is not in dispute that apart from the imported raw materials the petitioners used to store the indigenously acquired raw materials in the bonded warehouse and utilise the same in the manufacture of the final product. Payment of customs duty with interest under section 61 of the Customs Act applies to the imported raw materials and not to the indigenous raw materials stored in the warehouse.

4. By a show cause notice dated 15/2/1995, the petitioners were called upon to show cause as to why the customs duty with interest should not be demanded in respect of the raw materials remaining stored in the warehouse beyond the bond period. According to the customs authorities, the petitioners had not maintained

proper books of account regarding the consumption of the imported raw materials as well as the indigenously acquired raw materials stored in the warehouse and by treating the raw materials lying in the warehouse to be imported raw materials duty with interest was claimed under the show cause notice. The petitioners in their reply contended that the entire quantity of imported raw materials stored in the warehouse have been consumed in the manufacture of the final product and have been exported and that the unutilised raw materials lying in the warehouse were the indigenously acquired raw materials on which neither the customs duty nor the interest was payable.

5. On adjudication of the said show cause notice, the Assistant Commissioner of Customs by his order dated 7/7/1995 held that the petitioners have failed to establish that the imported raw materials stored in the bonded warehouse have been fully utilised in the manufacture of the final product and exported the same within the bond period. The Assistant Commissioner of Customs held that the goods lying in the warehouse beyond the bond period were unutilised imported raw materials on which duty as well as interest was payable and accordingly, confirmed the demand for duty and interest in respect of the said goods.

6. On appeal filed by the petitioners, the Commissioner of Customs (A) set aside the said adjudication order dated 7/7/1995 and remanded the matter for denovo consideration.

7. On remand, the Assistant Commissioner of Customs by a fresh order dated 14/1/1997 once again held that the goods lying in the warehouse were the unutilised imported raw materials and as the bond period had expired, he confirmed the duty demand of Rs.7,74,591/- and interest of Rs.11,03,909/- aggregating to Rs.18,78,500/- under section 61 read with section 72 of the Customs Act.

8. The petitioners once again filed an appeal and the Commissioner of Customs (A) by his order dated 27/11/1997 partially allowed the claim of the petitioners by confirming the demand of duty, only to the extent of Rs.84,003/- and interest to the extent of Rs.1,39,049/- aggregating to Rs.2,23,052/- and deleted the rest of the demand confirmed by the Asstt. Commissioner. Thus, the Commissioner (A) deleted the duty demand for Rs.6,90,588/- and interest of Rs.9,64,860/- aggregating to Rs.16,55,448/- by accepting the contention of the petitioners that the

raw materials lying in the warehouse were the indigenous raw materials on which neither the customs duty nor the interest was payable.

9. The revenue challenged the said order of the Commissioner of Customs (A) dated 27/11/1997 by filing an appeal before the CEGAT to the extent the order of Commissioner (A) was against the revenue i.e. in respect of the duty and interest amounting to Rs.16,55,448/- deleted by the Commissioner (A). According to the revenue, the raw materials lying in the warehouse were the imported raw material on which duty and interest was payable and that the Commissioner (A) was in error in holding that the same were indigenous raw materials.

10. During the pendency of the said appeal filed by the Revenue before CEGAT, the Central Government by Finance (No.2) Act, 1998 introduced KVSS. Section 88 of the said Finance Act which is relevant for the purpose herein reads as under :-

> "88. Settlement of tax payable - Subject to the provisions of this Scheme, where any person makes, on or after the 1st day of September, 1998, but on or before the 31st day of December, 1998, a declaration to the designated authority in accordance with the provisions of section 89 in respect of tax arrear, then, notwithstanding

anything contained in any direct tax enactment or indirect tax enactment or any other provision of any law for the time being in force, the amount payable under this Scheme by the declarant shall be determined at the rates specified here-under, namely:-

(a) ......

(b) ......

(c) ......

(d) ......

(e) ......

(f) Where the tax arrear is payable under the indirect tax enactment -

(i) in a case where the tax arrear comprises fine, penalty or interest does not include duties (including drawback of duty, credit of duty or any amount representing duty) or cesses, at the rate of fifty per cent, of the amount of such fine, penalty of interest, due or payable as on the date of making a declaration under section 88;

(ii) in any other case, at the rate of fifty per cent, of the amount of duties (including drawback of duty, credit of duty or any amount representing duty) or cesses due or payable on the date of making a declaration under section 88. "

From the aforesaid section 88(f) (ii) of the Finance Act, 1998 it is seen that any person disputing the correctness of the customs duty as well as the penalty / interest demanded from him, could file a declaration under KVSS, and if his declaration is found to be in accordance with the scheme, then on payment of

fifty percent of the duty, the liability in respect of the balance 50% of duty as well as penalty / interest would stand discharged.

11. It appears that there was a dispute as to whether the duty with interest payable on the imported goods stored in the warehouse beyond the bond period are covered under KVSS. Therefore, the Finance Ministry on 28/10/1998 issued a clarification in the matter. The relevant portion of clarificatory instructions issued by the Finance Ministry on 28.10.1998 reads as under :-

ISSUE/DOUBT INVOLVED	INSTRUCTION/CLARIFICATION
16. Treatment of cases in respect of ware-housed goods, which have not been cleared from the warehouse on expiry of the period which the goods were permitted under Section 61 of the Customs Act, 1962, to remain in a warehouse and where demand issued to the party under Section 72 of the Customs Act, 1962.	In such cases the duty payable is not under dispute. By allowing ware -housing the Department only postpones collection of duty which is attracted on imports. Under Section 72, this has to be paid up forthwith at the expiry of warehousing period along with interest etc., if the goods are not cleared earlier. Hence, such cases would not be covered under the Samadhan Scheme.

12. Since the appeal filed by the revenue challenging the order of Commissioner (A) was pending before the CEGAT, the petitioners opted for KVSS and filed a declaration on 23/12/1998. It was stated in

the declaration that the duty and interest confirmed by the Commissioner (A) had already been paid by the petitioners and as regards the duty of Rs.6,90,588/- and interest of Rs.9,64,860/- aggregating to Rs.16,55,448/- deleted by the Commissioner (A), the revenue has filed appeal before the CEGAT and the same is pending. It was stated that in view of the pendency of the dispute before CEGAT as to whether the raw materials lying in the warehouse are imported raw materials or indigenously acquired raw materials, the petitioners are desirous of availing the benefit under KVSS so that on payment of 50% of disputed duty, the balance demand would stand waived under KVSS. Accordingly, the petitioners offered to pay duty amounting to Rs.3,45,294/- (50% of Rs.6,90,588/-) on acceptance of their declaration.

13. The customs authorities, initially, by an order dated 26.02.1999 accepted the declaration partially, by directing the petitioners to pay fifty percent of the disputed duty but declined to waive the interest on the ground that the waiver of interest in respect of the warehoused goods is not covered under KVSS. Subsequently by an order dated 24.03.1999, the customs authorities rejected the declaration of the petitioners in toto on the ground that as per the aforesaid

clarification dated 28.10.1998 issued under Section 96 of the Finance (No.2) Act of 1998, the petitioners were not eligible to avail the benefit of KVSS in respect of the duty and interest payable on the raw materials lying in the warehouse beyond the bond period.

14. Challenging the aforesaid orders of the customs authorities as also the Ministry's clarificatory order dated 28.10.1998, the petitioners have filed the present petition.

15. To complete the narration of facts, it may be noted that the appeal filed by the revenue against the order of Commissioner (A) has been allowed by the CEGAT subsequently on 23/9/1999. By the said order, the Tribunal held that the goods lying in the warehouse beyond the bond period were imported raw materials on which duty and interest was payable under the Customs Act and accordingly the Tribunal has set aside the order of the Commissioner(A).

16. The question that arises for consideration in the present petition is, whether the customs authorities were justified in rejecting the declaration of the petitioners made under KVSS, by relying upon the Finance Ministry's clarification dated 28/10/1998 ?

17. Under section 46 read with section 59 of the Customs Act, the imported goods are permitted to be warehoused without payment of duty, on execution of a bond to the effect that the importer would pay at the time of clearance from the warehouse, duty and interest if any, payable under section 61(2) of the Customs Act. As a 100% EOU, the petitioners were permitted to warehouse the imported raw materials, use the same in the manufacture of the final product and clear the same from the warehouse for export without payment of duty. In respect of the unutilised imported raw materials stored in the warehouse, the customs authorities, on expiry of the bond period could demand customs duty with interest under section 61 read with section 72 of the Customs Act, even though the goods are not actually cleared from the warehouse. Thus, failure to clear the imported raw materials from the warehouse within the bond period renders the importer liable for duty with interest. Section 61 or 72 are not applicable to the indigenous raw materials permitted to be stored in the warehouse for utilisation in the manufacture of the export product, because, in respect of the indigenous raw materials the customs duty is not attracted. In the present case, the Commissioner (A) by his order dated 27/11/1997 had held that the goods lying in the

warehouse were indigenous raw materials stored by the petitioners on which no customs duty was payable and accordingly deleted duty of Rs.6,90,588/- and also interest of Rs.9,64,860/- aggregating to Rs.16,55,448/- confirmed by the Asstt. Commissioner of Customs. This decision of the Commissioner (A) was disputed by the revenue and an appeal was filed by the revenue before the CEGAT and the same was pending on the date of declaration made by the petitioners under KVSS. In other words, at the time of making declaration under KVSS, there was a basic dispute raised by the revenue as to whether the goods lying in the warehouse were imported goods or indigenous goods. It is only when that dispute was resolved and declared that the goods lying at the warehouse were imported goods, the question of demanding customs duty with interest would arise. Thus, in the facts of the present case, as the appeal filed by the revenue was admittedly pending before CEGAT, it could not be said that there was no dispute regarding the duty and interest payable on the goods lying in the warehouse. It is not in dispute that the benefit of KVSS is available even in cases where the appeal filed by the revenue is pending before the appellate authority. Therefore, in the facts of the present case, the customs authorities were not justified in holding that there was no dispute

regarding the duty and interest payable on the warehoused goods and in rejecting the declaration made by the petitioners under KVSS.

18. The fact that the CEGAT subsequently by its order dated 23/9/1999 has reversed the order of the Commissioner (A) and held that the goods lying in the warehouse were imported goods on which customs duty and interest was payable, would not affect the case of the petitioners, because, on the date of declaration there was a dispute raised by the revenue to the effect that the Commissioner (A) was in error in holding that the goods lying in the warehouse were indigenous goods and that on such goods customs duty and interest was not payable. Till the CEGAT reversed the finding of Commissioner (A) there was a subsisting dispute between the parties regarding the customs duty and interest payable on the raw materials lying in the warehouse and, therefore, in the facts of the present case it was open to the petitioners to seek relief by filing a declaration under KVSS. The KVSS read with the clarification dated 28/10/1998 may not apply in respect of imported raw materials stored in the warehouse beyond the bond period, but, the benefit under KVSS would be available where the dispute is, whether the goods lying in the warehouse are imported goods or

indigenous goods. In other words, the said clarification dated 28/10/1998 would not be applicable where the dispute is regarding the nature of the goods lying in the warehouse. Thus, in the facts of the present case, admittedly, when there was a dispute regarding the status of the raw materials lying in the warehouse, the customs authorities were not justified in treating the raw materials lying in the warehouse as imported raw materials and reject the declaration made by the petitioners by relying upon the clarification issued on 28/10/1998.

19. In this view of the matter, without going into the validity of the Finance Ministry's clarificatory letter dated 28/10/1998, we hold that the dispute as to whether the raw materials lying in the warehouse were imported raw materials or indigenous raw materials was a dispute covered under the KVSS and the customs authorities were not justified in rejecting the declaration made by the petitioners by treating the raw materials lying in the warehouse were imported raw materials.

20. Accordingly, the petition succeeds. The impugned orders dated 26/02/1999 and 24/03/1999 are quashed and set aside and the customs authorities are

directed to entertain the declaration of the petitioners dated 23/12/1998 and pass appropriate order thereon in accordance with law.

21. The petition is allowed in the above terms with no order as to costs.

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(V.C. DAGA,J.)

(J.P. DEVADHAR, J.)